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No. 98-1336

IN THE SUPREME COURT OF THE UNITED STATES
October 1998 Term

BRANSON SCHOOL DISTRICT RE-82, PRITCHETT SCHOOL DISTRICT RE-3, SPRINGFIELD PUBLIC SCHOOLS DISTRICT RE-4, and KANDACE SUE SPURLING and BROOKE ILENE SPURLING, by and through their parents, DAVID EARL SPURLING and LONA SUE SPURLING,

Petitioners,

vs.

BILL OWENS, in his official capacity as Governor of the State of Colorado, JAY KENNEY, LUANNE C. HAZELRIGG, JOHN STULP, THOMAS SWANSON and CHARLES VIDAL, all in their official capacities as members of the COLORADO STATE BOARD OF LAND COMMISSIONERS,

Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the Tenth Circuit correct in holding that sections 3, 9, and 10 of Article IX of the Colorado Constitution, as amended in the 1996 General Election, are consistent with the terms and conditions of the Colorado Enabling Act, 18 Stat. 474 (1875)?

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No. 98-1336

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BRANSON SCHOOL DISTRICT RE-82, PRITCHETT SCHOOL DISTRICT RE-3, SPRINGFIELD PUBLIC SCHOOLS DISTRICT RE-4, and KANDACE SUE SPURLING and BROOKE ILENE SPURLING, by and through their parents, DAVID EARL SPURLING and LONA SUE SPURLING,

Petitioners,

vs.

BILL OWENS, in his official capacity as Governor of the State of Colorado, JAY KENNEY, LUANNE C. HAZELRIGG, JOHN STULP, THOMAS SWANSON and CHARLES VIDAL, all in their official capacities as members of the COLORADO STATE BOARD OF LAND COMMISSIONERS,

Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Bill Owens, in his official capacity as Governor of the State of Colorado,[1] Luanne C. Hazelrigg, Jay P. K. Kenney, John Stulp, Thomas W. Swanson, and Charles A. Vidal,

[1] Governor Bill Owens has been substituted in this proceeding for former Governor Roy Romer.

in their official capacities as members of the Colorado State Board of Land Commissioners[2] (collectively "Respondents"), respectfully request that this Court deny the Petition for Writ of Certiorari.[3]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 7 of the Colorado Enabling Act, 18 Stat. 474 (1875), provides:

> That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of congress, other lands equivalent thereto in legal sub-divisions of not more than one quarter-section, and as contiguous as may be, are hereby granted to said state for the support of common schools.

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[2] As a result of a change in composition of the Board, Commissioners Luanne C. Hazelrigg, Jay P.K. Kenney, and John Stulp have been substituted for former Commissioner Robert Mailander.

[3] The Petition for Writ of Certiorari filed by Branson School District RE-82, Pritchett School District RE-3, Springfield Public Schools District RE-4, and Kandace Sue Spurling and Brooke Ilene Spurling, by and through their parents, David Earl Spurling and Lona Sue Spurling (collectively "Petitioners") will be referred to herein as the "Petition" and cited to as "Pet." The Petitioners' Appendix will be cited to as "Pet'rs App."

Section 14 of the Colorado Enabling Act, 18 Stat. 474 (1875), provides:

> That the two sections of land in each township herein granted for the support of common schools shall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the proceeds to constitute a permanent school fund, the interest of which to be expended in the support of common schools.

Sections 3, 9, and 10 of Article IX of the Colorado Constitution, as amended by the Colorado voters in 1996, are set out fully in Petitioners' Appendix. Pet'rs App. at 94a-99a.

STATEMENT OF THE CASE

In 1875, Congress passed the Colorado Enabling Act, 18 Stat. 474 (1875). The two sections of the Colorado Enabling Act that are relevant to this case, sections 7 and 14, are set out above. In 1876, the People of Colorado adopted a state constitution, which included provisions concerning the management of the lands conveyed by the federal government to Colorado for the support of its common schools ("school lands"). Colo. Const. of 1876, Art. IX, secs. 3, 9, and 10 (Pet'rs App. at 92a-93a). At the general election held on November 5, 1996, the People of Colorado approved an amendment to the Colorado Constitution that concerned management of the school lands ("Amendment 16"). Pet. at 6-8. Amendment 16 amended sections 3, 9, and 10 of Article IX of the Colorado Constitution. Pet'rs App. at 94a-99a.

Petitioners brought suit in the United States District Court against Defendant Roy Romer, in his official capacity

as Governor of Colorado, and the members of the Colorado State Board of Land Commissioners in their official capacities. The Colorado State Board of Land Commissioners ("Board") is the body responsible for managing the school lands.

Petitioners challenged the federal constitutionality of Amendment 16, alleging that: (1) Congress, through the Colorado Enabling Act, had created a binding federal trust with respect to the management of school lands; (2) Amendment 16 violated the terms of that trust; and (3) because Amendment 16 violated the terms of the Enabling Act, Amendment 16 violated the United States Constitution's Supremacy Clause. The District Court entered a temporary restraining order enjoining the implementation of Amendment 16 on December 26, 1996, and set the matter for a preliminary injunction hearing. *Branson School Dist. RE-82 v. Romer*, 958 F. Supp. 1501, 1506 (D. Colo. 1997).

Following the preliminary injunction hearing on January 15, 1997, the District Court dissolved the temporary restraining order, entered a preliminary injunction with respect to one aspect of Amendment 16 which addresses the liability of individual Board members, and denied all other aspects of the motion for a preliminary injunction. *Id.*

On March 26, 1997, the District Court granted Colorado's Motion for Summary Judgment and dissolved the remaining preliminary injunction. In reaching this result, the District Court found that: (1) it had subject matter jurisdiction; (2) Congress, through the Colorado Enabling Act, created a binding federal trust; and (3) Amendment 16 is consistent with the Enabling Act, and, thus, is consistent with the United States Constitution. *Id.* at 1523.

Petitioners appealed to the Tenth Circuit Court of

Appeals. On November 20, 1998, the Tenth Circuit issued its decision affirming the decision of the district court in its entirety. *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998) ("*Branson*").

SUMMARY OF THE ARGUMENT

Petitioners establish no valid reason why the Tenth Circuit's decision should be reviewed by this Court. The issue presented by the Petition is whether the Tenth Circuit correctly decided that Amendment 16, on its face, is consistent with the Colorado Enabling Act. Petitioners mischaracterize Amendment 16 by stating that it "*requires* state officials to manage school trust lands to achieve goals other than, and inconsistent with, 'the support of common schools[.]'" Pet., Question Presented at *i* (emphasis added). Amendment 16 does not require – or permit – the Board to manage the school lands for the benefit of any entity other than Colorado public schools. In fact, Amendment 16 expressly provides that "the state school lands are an endowment of land assets held in a perpetual, inter-generational public trust for the support of public schools" and "the disposition and use of such lands should therefore benefit public schools . . . ." Colo. Const., art. IX, sec. 10(1).

Petitioners' analysis requires the Court to presume that the Board will breach its fiduciary duties to Colorado public schools. There is no basis for such speculation. Furthermore, both the District Court and the Tenth Circuit emphasized in deciding this case that such speculation would be inappropriate. *Branson School Dist. RE-82 v. Romer*, 958 F. Supp. 1501, 1517-22 (D. Colo. 1997); *Branson*, 161 F.3d at 638-42. When one focuses on Amendment 16 itself, it is apparent that it is fully consistent with the Colorado Enabling Act.

Petitioners fail to show a conflict between the Tenth Circuit's decision and any decision of this Court or a state supreme court. The Tenth Circuit employed a similar reasoning process to that used by this Court in interpreting the New Mexico-Arizona Enabling Act in *Ervien v. United States*, 251 U.S. 41 (1919) and *Lassen v. Arizona*, 385 U.S. 458 (1967). The Tenth Circuit relied on the language and history of the Colorado Enabling Act in deciding that Amendment 16 is consistent with the Act. The allegedly conflicting decisions cited by Petitioners are inapplicable to the Tenth Circuit's decision because none of those decisions interpreted the Colorado Enabling Act. Moreover, each of the decisions relied on by Petitioners can be distinguished on the facts from the decision in *Branson*.

Finally, contrary to Petitioners' argument, the Tenth Circuit's conclusion that the Colorado Enabling Act created a federal trust simply does not rise to the level of an important question of federal law that should be finally settled by this Court. Petitioners agree with the Tenth Circuit's conclusion that the Colorado Enabling Act created a federal trust, yet they assert that the Tenth Circuit's decision on this issue justifies further review by this Court. However, this is not a case of national significance. The Tenth Circuit's decision that the Colorado Enabling Act created a federal trust is applicable only to courts interpreting the Colorado Enabling Act, and it is germane only to the Colorado Enabling Act and the Colorado Constitution. Accordingly, the Tenth Circuit's holding has limited precedential value.

REASONS WHY THE PETITION SHOULD BE DENIED

Because this is a facial challenge to the federal constitutionality of Amendment 16, there is a presumption that Amendment 16 is constitutional. *See National R.R. Passen-*

ger Corp. v. Atchinson, Topeka and Santa Fe Ry., 470 U.S. 451, 472 (1985). If there is a fairly possible construction of Amendment 16 that results in its constitutionality, the court must accept that construction and reject any construction that results in its unconstitutionality. *Communications Workers v. Beck*, 487 U.S. 735, 762 (1988); *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

I. AMENDMENT 16 IS CONSISTENT WITH THE COLORADO ENABLING ACT.

The Tenth Circuit found that the Colorado Enabling Act contains three overriding principles: the sole and exclusive beneficiary of the school lands is the common schools; the sole and exclusive method for disposing of the school lands is through a public sale with a certain minimum price; and, the interest from the fund created by these land sales is exclusively and permanently dedicated to the support of common schools. *Branson*, 161 F.3d at 637. Petitioners, as well as Respondents, agree with the Tenth Circuit that these three principles are the only mandates contained in the Colorado Enabling Act. Pet. at 10.

Although Petitioners claim that Amendment 16 is "legally similar" to the laws and actions that have been struck down by this Court and the supreme courts of nine western states, Pet. at 12, Petitioners fail to delineate any similarities between the challenged provisions of Amendment 16 and the laws and actions considered by this Court or the state courts. As shown below, there are no conflicts between the Tenth Circuit's decision and this Court's decisions or any state court decision. Other than these cases, Petition-

ers provide no support for their allegations that Amendment 16 is contrary to the Colorado Enabling Act.

Petitioners specifically challenge three provisions of Amendment 16. Pet. at 11-12. First, Petitioners claim that Amendment 16 violates the Enabling Act by adding "except as provided in this Article IX" to Article IX, section 3's requirement that the public school fund shall "forever remain inviolate and intact." Pet. at 11. Petitioners, however, neglect to point out that Amendment 16 left intact the constitutional provisions that require the Permanent Fund to be "securely and profitably invested," and require the state to "supply all losses thereof that may in any manner occur." Colo. Const. art. IX, sec. 3. Petitioners fail to demonstrate how the exception can endanger the Permanent Fund given that the constitution requires the state to make the Fund whole for any losses that may occur. The challenged exception allows the Permanent Fund to be invested in school bonds, which will have direct benefits for the schools at no risk to the Fund in general. Accordingly, there is no deviation from the Enabling Act's requirement for the Fund to be permanently dedicated to the support of common schools. Furthermore, Petitioners' claim is not premised on the face of the Amendment, but rather is based solely on speculation that the Board will act unlawfully.

Petitioners next attack the provision of Amendment 16 that substituted the mandate that it is the Board's duty "to provide for the prudent management, location, protection, sale, exchange, or other disposition of all [school] lands . . . in order to produce reasonable and consistent income over time" for the earlier requirement that the Board was to administer the lands "in such a manner as will secure the maximum possible amount therefor." Colo. Const. art. IX, sec. 10 (Pet'rs App. at 104a). First, the Colorado Enabling Act does not require the Board to maximize income from the

school lands. Therefore, it is compatible with the Enabling Act to change the standard to "reasonable and consistent income over time." Moreover, the new standard is concordant with a trustee's duty to deal fairly with successive beneficiaries. *See, e.g.*, Restatement (Third) of Trusts § 232, cmt. c (1991) ("[I]f there are subsequent income beneficiaries, they as well as remainder beneficiaries have a right to see that their interests are not disregarded as a result of efforts to provide what might amount to a higher than appropriate yield for the current income beneficiary."). This is especially important given that the school lands will be required to provide support for future generations of students.

Petitioners' third complaint is aimed at the Stewardship Trust.[4] Pet. at 12. Petitioners allege, incorrectly, that

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[4] Amendment 16 requires the Board to:

> [e]stablish[] and maintain[] a long-term stewardship trust of up to 300,000 acres of land that the board determines through a statewide public nomination process to be valuable primarily to preserve long-term benefits and returns to the state; which trust shall be held and managed to maximize options for continued stewardship, public use, or future disposition, by permitting only those uses, not necessarily precluding existing uses or management practices, that will protect and enhance the beauty, natural values, open space, and wildlife habitat thereof; . . . specific parcels of land held in the stewardship trust may be removed from the trust only upon the affirmative vote of four members of the board and upon the designation or exchange of an equal or greater amount of additional land into said trust.

the Stewardship Trust "is *not* to be managed in a way which benefits the public school fund." Pet. at 12 (emphasis in original). Petitioners assume that public schools will be harmed if the Board permits only uses that protect the beauty, natural values, open space, and wildlife habitat of the property. There is no basis for this assumption. The purpose of the Stewardship Trust is to preserve the long-term productivity of approximately ten percent of the school lands. Pursuant to the Enabling Act and Amendment 16, the Board's obligation to public schools is unlimited in time. The Stewardship Trust is aimed at securing some benefit of the school trust land asset for these future generations of school children. This goal is consistent with a trustee's duty to successive beneficiaries. *See, e.g.,* Restatement (Third) of Trusts § 232, cmt. c (1991) ("The trustee is also under a duty to the remainder beneficiaries to exercise reasonable care in an effort to preserve the trust property, and this duty ordinarily includes a goal of protecting the property's purchasing power."). In addition, the Stewardship Trust complies with a trustee's duty to diversify and balance the trust assets. Restatement (Third) of Trusts § 227(b) (1991) (in making decisions about investment, the trustee has a duty to diversify). Furthermore, nothing in Amendment 16 prevents the schools from receiving income from Stewardship Trust lands through leases or other arrangements. In fact, Amendment 16 specifically allows existing uses of the property to continue, and allows new income-producing uses to be initiated. It, however, requires that the long-term value of the land in the Stewardship Trust be preserved by protecting its beauty, natural values, open space and wildlife habitat.

Petitioners' arguments suggest that they believe the Stewardship Trust is the legal equivalent to the creation of a park or the donation of a conservation easement. Pet. at 26-

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Colo. Const. art. IX, sec. 10(1)(b)(I).

27. This is an inaccurate portrayal of the Stewardship Trust. Property that is included in the Stewardship Trust continues to be managed by the Board, can generate income for public schools, and is embraced by the Board's duties to manage the property solely for the benefit of Colorado public schools now and in the future. Stewardship Trust property is to be "managed to maximize options for continued stewardship, public use, or *future disposition*." Colo. Const. Art. IX, sec. 10(1)(b)(I) (emphasis added). If the Board determines that the beneficiaries are not well-served by the inclusion of particular property in the Stewardship Trust, the property can be removed by a vote of four commissioners.[5] These attributes of the Stewardship Trust distinguish it from a state park or a conservation easement.[6]

Amendment 16 is wholly compatible with the re-

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[5] The reversibility of a Stewardship Trust designation distinguishes the Stewardship Trust from the charitable donations discussed by Petitioners. Pet. at 27. 26 U.S.C. § 2055(f) applies to "irrevocable transfers of easements in real property," and 26 U.S.C. § 170(h) is limited to a restriction on use "granted in perpetuity."

[6] Petitioners also contend that the repeal of the requirement that "the General Assembly shall provide . . . for the faithful application of the proceeds [of the school lands] in accordance with the terms of said grants" Pet'rs App. at 93a, demonstrates that Amendment 16 abolishes Colorado's allegiance to the common schools. Pet. at 12. However, the inclusion in Amendment 16 of the requirements that the Board "shall serve as the trustee for the[se] lands" and that it "shall have the duty to manage, control, and dispose of such lands in accordance with the purposes for which said grants of land were made" makes the deleted provision unnecessary. *See* Colo. Const. art. IX, sec. 9(6).

quirements of the Colorado Enabling Act. Accordingly, this Court should deny the Petition for Writ of Certiorari.

II. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE DECISIONS OF THIS COURT THAT ADDRESS STATE ENABLING ACTS.

Petitioners contend that the Tenth Circuit's decision is inconsistent with this Court's decisions in *Ervien v. United States*, 251 U.S. 41 (1919) and *Lassen v. Arizona*, 385 U.S. 458 (1967). Petitioners do not indicate what aspects of the Tenth Circuit's decision conflict with these decisions, and Respondents cannot discern any inconsistencies. In fact, the Tenth Circuit relied on this Court's decisions in *Lassen* and *Ervien* when it discussed the process it must follow to interpret the Colorado Enabling Act. *See Branson*, 161 F.3d at 633, 637.

As this Court has noted, the question of the effect of any state's enabling act requires specific analysis of the enabling act itself. *Papasan v. Allain*, 478 U.S. 265, 289-90 n.18 (1986) ("The starting point of any consideration of this question must be the federal grants themselves, for it is clear that the interest transferred to the State depends on the federal laws that transferred that interest."). The Tenth Circuit's reasoning is consistent with the reasoning employed by this Court in *Lassen* and *Ervien;* in each case the court reviewed the text of the land grant at issue to define the terms of the state's responsibilities. *See Ervien*, 251 U.S. at 47-48; *Lassen*, 385 U.S. at 461 (resolution of these "issues require[s] consideration of the Act's language and history"); *Branson*, 161 F.3d at 637 ("In determining whether Amendment 16 violates Colorado's fiduciary duties, we must at the outset specify the scope of those duties. In doing so, we are guided first by the plain language of the enabling act."). The proc-

ess employed by the Tenth Circuit of looking at the terms of the Colorado Enabling Act rather than at the terms of any other state's Enabling Act is consistent with this Court's previous decisions.

In *Ervien* and *Lassen*, this Court intepreted the New Mexico-Arizona Enabling Act, which is significantly different from the Colorado Enabling Act. When one examines the specific issues resolved by those cases in light of the differences between the applicable Enabling Acts, it is clear that the Tenth Circuit's decision does not conflict with this Court's decisions. In *Ervien*, this Court determined that legislation that authorized the New Mexico Commissioner of Public Lands to expend a portion of the income from leases and sales to advertise the advantages of the state violated the New Mexico-Arizona Enabling Act. The legislation at issue in *Ervien* would have resulted in harm to the trust because trust income would have been diverted to something other than a use authorized by the Enabling Act. In contrast, nothing in Amendment 16 permits the Board or the State of Colorado to use income from the school lands for any purpose but to benefit public schools. In fact, Amendment 16 emphasizes that public schools are the beneficiary of Colorado school lands.[7]

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[7] *See* Colo. Const. art. IX, sec. 10(1) ("The people of the state of Colorado recognize (a) that the state school lands are an endowment of land assets held in a perpetual, inter-generational public trust for the support of public schools, which should not be significantly diminished, [and] (b) that the disposition and use of such lands should therefore benefit public schools including local school districts . . . ."); Colo. Const. art. IX, sec. 9(6) ("The board shall serve as the trustee for the lands granted to the state in public trust by the federal government . . . . It shall have the duty to manage, control, and dispose of such lands in accordance with the purposes

In *Lassen*, this Court held that the New Mexico-Arizona Enabling Act prohibited Arizona from acquiring school trust lands for highway rights-of-way or material sites for anything less than full appraised value. 385 U.S. at 469. The first distinction between *Lassen* and *Branson* is that the challenged action in *Lassen* was specifically prohibited by the Enabling Act. Unlike the Colorado Enabling Act, the New Mexico-Arizona Enabling Act expressly prohibits the disposition of property at less than its full appraised value. 385 U.S. at 472. Further, the action at stake in *Lassen* would have resulted in actual financial harm to the trust because the trust would not have received any income from the use of trust property for highway rights-of-way or material sites. Unlike *Lassen*, *Branson* is a facial challenge, and nothing on the face of Amendment 16 permits the Board to dispose of property without receiving reasonable compensation. Rather, Amendment 16 requires the Board to manage the school lands "to produce reasonable and consistent income" for Colorado public schools. Colo. Const. art. IX, sec. 10(1).

In summary, the Tenth Circuit considered and relied on this Court's decisions in *Ervien* and *Lassen* in reaching its decision in *Branson*. The Tenth Circuit's decision is entirely consistent with this Court's decisions.

III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE DECISIONS OF THE STATE SUPREME COURTS THAT HAVE ADDRESSED SIMILAR ISSUES.

Petitioners fail to demonstrate any legitimate conflicts between the Tenth Circuit's decision and the decision

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for which said grants of land were made . . . .").

of any state supreme court. None of the supposedly conflicting cases addressed Colorado's Enabling Act or Colorado's Constitution. Nor did any of these decisions turn on a provision in another state's Enabling Act that is analogous to any provision in the Colorado Enabling Act. Consequently, these other states' decisions are not applicable to the decision in *Branson*. Likewise, review by this Court of the Tenth Circuit's decision will have minimal, if any, impact on the laws of other states since the Tenth Circuit's decision rests explicitly on the interpretation of the Colorado Enabling Act and the Colorado Constitution which are both unique to Colorado.

Not only is each Enabling Act unique to its particular state, but each of the cases discussed by Petitioners can be distinguished on the facts from the matters addressed in *Branson*. Each case cited by Petitioners is based on a specific lease, statute, or constitutional provision which, if not enjoined by the court, would have resulted in actual loss of money to the school trust, a direct violation of an Enabling Act or state constitutional provision, or a direct breach of trust responsibilities. In contrast, Amendment 16 does not require or permit the Board to divert assets away from Colorado public schools; it does not conflict, directly or indirectly, with the three principles that are contained in the Colorado Enabling Act; and it reinforces rather than breaches the Board's fiduciary responsibilities to Colorado public schools.

An examination of the state supreme court cases cited by Petitioners reveals that the Tenth Circuit's decision does not conflict with any of these decisions. In *Ebke v. Board of Educational Lands and Funds*, 47 N.W.2d 520 (Neb. 1951), the court concluded that leasing school property for less than market value violates the Nebraska Constitution. The court based its decision on the state constitution rather than the

Enabling Act. *Ebke* can further be distinguished from *Branson* because in *Ebke* the trust would have been harmed financially if school property would have been leased at less than market value. In contrast, Petitioners have not shown that Amendment 16, on its face, will result in any harm to Colorado public schools.

Similarly, there is no conflict between the Tenth Circuit's decision and the decision in *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909 (Utah 1993) ("*NPCA*"). The court in *NPCA* found that the Board did not breach its trust duties by *refusing to give priority* to the scenic, aesthetic, and recreational values of the school trust land when it approved a land exchange. There was no allegation in *NPCA* that the constitution, a statute, or a transaction violated the Utah Enabling Act; rather the Association attempted to block a particular transaction by asking the court to require the Board to give priority to noneconomic interests over financial concerns. The issue is entirely different from any issue presented in *Branson*.[8] The

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[8] In addition, Petitioners take a portion of the court's decision in *NPCA* out of context by implying that the court directed the State to purchase property to preserve its noneconomic values. Pet. at 17. The full quotation reads as follows and supports the constitutionality of Amendment 16:

> Although the primary objective of the school land trust is to maximize the economic value of school trust lands, ***that does not mean that school lands should be administered to maximize economic return in the short run.*** The beneficiaries of the school land trust, the common schools, are a continuing class, and the trustee must maximize the income from school lands in the long run. . . . It may be possible for the Division to protect and pre-

court in *NPCA* was evaluating a specific transaction, whereas Amendment 16 was challenged on its face. Nothing on the face of Amendment 16 requires the Board to give priority to noneconomic values. Further, it would have been inappropriate for the Tenth Circuit to speculate that the Board may someday choose to prioritize noneconomic values.

In *State v. Commissioners of the Land Office*, 301 P.2d 655 (Okla. 1956), the court found that it was a violation of the Oklahoma Enabling Act for the state to modify its constitution to allow oil and gas royalties to be expended as current revenues. In contrast with Amendment 16, the Oklahoma constitutional amendment was in direct conflict with a provision in the Oklahoma Enabling Act that requires royalties from oil and gas leases to be deposited into the permanent fund. Amendment 16 does not contain a similar provision, nor does the Colorado Enabling Act contain a similar requirement.

> serve [unique scenic, paleontological, and archeological] values without diminishing the economic value of the land. . . . But when economic exploitation of such lands is not compatible with the noneconomic values, the state may have to consider exchanging public trust lands or other state lands for school lands. Indeed, it might be necessary for the state to buy or lease the school lands from the trust so that unique noneconomic values can be preserved and protected and the full economic value of the school trust lands still realized.

869 P.2d at 920-21 (emphasis added).

The other Oklahoma case cited by Petitioners is also dissimilar to *Branson*. In *Oklahoma Education Ass'n v. Nigh*, 642 P.2d 230 (Okla. 1982), the court struck down as inconsistent with the state constitution, as well as the Enabling Act, legislation that set maximum rental rates and established a renewal preference for the current lessee. There are no similar requirements in Amendment 16.

In *County of Skamania v. State*, 685 P.2d 576 (Wash. 1984), the court ruled that the legislature violated the state's fiduciary duties to the trust beneficiaries by modifying contracts for the sale of timber from trust lands. The legislation would have resulted in actual harm to the trust due to lost revenues from timber contracts. There is no evidence that Amendment 16, on its face, will result in lost income to the Colorado public schools. Nor does Amendment 16 permit or require the Board to modify any existing contracts.

The court in *Kanaly v. State*, 368 N.W.2d 819 (S.D. 1985), found that legislation that converted trust property from use as a university to use as a prison without compensation to the university trust violated both the South Dakota Enabling Act and the South Dakota Constitution. The trust was clearly harmed by the conversion of property without compensation to the trust. There is nothing in Amendment 16 that would sanction such a transfer, and it is improper in a facial challenge to speculate that the Board would breach its duty of loyalty to Colorado public schools by approving a similar transaction.

Petitioners also fail to establish any conflict between *Department of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985), and the Tenth Circuit's decision in *Branson*. There, the court found that the state rather than the lessee owned a water right developed on school land. The lost value would have been a detriment to the trust if the lessee had been al-

lowed to own a water right developed on school lands. Neither Amendment 16 nor the Tenth Circuit's decision would require a different conclusion than that reached in *Pettibone* if a similar case were presented in Colorado.

There is also no conflict between *Branson* and *Gladden Farms, Inc. v. State*, 633 P.2d 325 (Ariz. 1981). The Arizona court found that the sale of school trust lands to a state agency without a public auction violated the New Mexico-Arizona Enabling Act. The court relied on a specific provision in the New Mexico-Arizona Enabling Act that prohibits the sale of school land "except to the highest and best bidder at the public auction." *Id.* at 329. The Colorado Enabling Act's public sale provision is not as specific or restrictive as the provision at issue in *Gladden*.

The decision in *State v. Walker*, 301 P.2d 317 (N.M. 1956), is very similar to this Court's decision in *Ervien*. The court held that the state must pay for rights-of-way across, and sand and gravel removed from, state trust lands. Nothing in Amendment 16 or *Branson* is inconsistent with this conclusion.

The two Alaska cases discussed by Petitioners address the state's use of trust property for a non-trust purpose. In *State v. University of Alaska*, 624 P.2d 807 (Alaska 1981), the court found it was a breach of trust for the state to designate university trust land as a state park without paying compensation to the university. Amendment 16 emphasizes that disposition and use of state school lands should benefit public schools, and requires the Board to generate reasonable and consistent income from the school lands. Accordingly, neither Amendment 16 nor the Tenth Circuit's decision sanctions such a transaction, and there is no conflict between the decisions. To the extent that Petitioners allege that designation of property into the Stewardship Trust is the legal

equivalent of creating a park, their depiction of the Stewardship Trust is inaccurate. *See* the discussion of the Stewardship Trust *supra* § I.

In *State v. Weiss*, 706 P.2d 681 (Alaska 1985), the court struck down legislation that designated mental health trust land as general grant land. Neither *Branson* nor Amendment 16 permits Colorado to manage the school lands for the benefit of any entity other than public schools. Accordingly, the two decisions are not in conflict.

In summary, there are no conflicts between the Tenth Circuit's decision and any of the state decisions discussed by Petitioners.

IV. REVIEW BY THIS COURT OF THE FEDERAL QUESTIONS ADDRESSED BY THE TENTH CIRCUIT IS UNWARRANTED.

Petitioners attempt to bolster their arguments for granting their Petition by alleging that the Tenth Circuit decided an important federal question that has not been, but should be, finally resolved by this Court. Pet. at 9. Petitioners do not contend that the Tenth Circuit erred in concluding that the Colorado Enabling Act created a federal trust, and they admit that they agree with the Tenth Circuit's decision on this issue. Pet. at 10. Petitioners are essentially asking this Court to give its stamp of approval to an aspect of the Tenth Circuit's decision with which they agree.

The issue of whether the Colorado Enabling Act created a federal trust is not a question that warrants further review by this Court. First, the resolution of this particular case does not require the Court to review the Tenth Circuit's decision regarding the creation of a federal trust. If this

Court reviewed the Tenth Circuit's decision and found that the Colorado Enabling Act did not create a federal trust, at the end of the day, the result would be the same as that reached by the Tenth Circuit: Amendment 16 would be legal, albeit perhaps for different reasons. Second, final resolution by this Court of the issue of whether the Colorado Enabling Act created a federal trust would have little value as a precedent. The decision would be binding only on courts evaluating the Colorado Enabling Act, and therefore, the effect on these courts of denying the Petition for Writ of Certiorari would be the same as the effect of this Court upholding the Tenth Circuit's decision on this issue. Finally, since lower courts are not routinely confronted with the question of whether the Colorado Enabling Act created a federal trust, there is not a significant need for this Court to resolve this issue.[9]

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[9] The issue of whether the Colorado Enabling Act created a federal trust is akin to the issue discussed in *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70 (1955). There, this Court reasoned:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. . . ."

Id. at 74 (citations omitted).

CONCLUSION

Petitioners have failed to identify any legitimate reason why this Court should review the Tenth Circuit's decision. Accordingly, Respondents request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted.

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